...e Court, U.S.
FILED

03 739 NOV 20 2003

In the

Supreme Court of the United States

NORMAND LABERGE,

Petitioner,

v.

DEPARTMENT OF THE NAVY,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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91 pp

QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in issuing a Rule 36 decision in this case, *Laberge v. Department of the Navy*, given that Merit Systems Protection Board (MSPB) Member Slavet's concurrence in *Laberge v. Department of the Navy* raised a significant question regarding the Federal Circuit precedence.

2. Whether the Federal Circuit decision is directly contrary to Congress' legislative mandate in the Whistleblower Protection Act of 1989.

3. Whether the Federal Circuit decision is directly contrary to the U.S. Supreme Court's Interpretation of Congress' legislative mandate in the Whistleblower Protection Act of 1989.

4. Whether -- irrespective of the confusion caused by *Huffman* -- Petitioner's disclosure is protected under *Huffman*, *Marano*, *Watson*, and *Willis*.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the United States Court of Appeals for the Federal Circuit were:

(1) Petitioner Normand Laberge;

- and –

(2) Respondent Department of the Navy.

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OPINIONS BELOW

The opinion of the Court of Appeals in *Laberge v. Dep't of the Navy* is reported at 2003 U.S. App. LEXIS 18874. The original decision of the Court of Appeals in this case is reported at 66 Fed. App. 204 (2003). The decision of the U.S. Merit Systems Protection Board in this case is reported at 91 M.S.P.R. 585 (2003).

JURISDICTION

The Court of Appeals judgment in *Laberge v. Dep't of the Navy* was entered on June 6, 2003. A timely petition for rehearing en banc was denied on August 22, 2003. The ninety (90) day period in which the Petitioner must file his Petition for Writ of Certiorari with the honorable Court expires on November 20, 2003. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

RELEVANT PROVISIONS

Federal Circuit Rule 36, Entry of Judgment – Judgment of Affirmance Without Opinion, states that "The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value... the decision of an administrative agency warrants affirmance under the standard of review in that statute authorizing the petition for review." Fed. Cir. R. 36.

The Whistleblower Protection Act of 1989 states that it is a violation of federal law to take or fail to take, or threaten to take or fail to take, a personnel action

with respect to any employee or applicant for employment because of:

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

5 U.S.C. § 2302(b)(8).

'Whistleblowing' is defined as:

> ... the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

5 U.S.C. § 1209.4 (b) [Emphasis supplied].

STATEMENT

Laberge v. Dep't of the Navy presents decisions by the U.S. Court of Appeals for the Federal Circuit which directly oppose the Federal Circuit's case law, run contrary to Congress's legislative mandate in the Whistleblower Protection Act of 1989, and stand against the U.S. Supreme Court's interpretation of Congress's legislative mandate in the Whistleblower Protection Act of 1989.

A member of the Merit Systems Protection Board has already stated with regard to Petitioner Normand Laberge's case, "I believe that applying the clear statutory language in light of the WPA's purpose should lead to the conclusion that the appellant engaged in statutorily-protected whistleblowing." 91 M.S.P.R. 585 at 600. (Slavet, Board Member, concurring).

Indeed, this Court has already addressed the purpose of the Whistleblower Protection Act when it noted:

> a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. *See e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); ... *Pickering*, *supra*, 391 U.S. at 569-571. Moreover, the government may certainly choose to give additional protections to its

> employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment, values central to our social order as well as our legal system. *See e.g.*, Whistleblower Protection Act of 1989, *supra.*

Waters, 511 U.S. at 673-674. Communications within the chain of command, then, like those made by Petitioner, are exactly the opposite of the type of communications the court distinguished as not being of concern. Laberge's communications thus ought to receive protection under the Whistleblower Protection Act of 1989, in light of the high Court's definition of protected government employee speech.

In taking up this case, the honorable Court may be able to bring resolution to the conflicting precedent of the Federal Circuit rulings on the definition of protected disclosures. While Congress has clarified that any disclosure, not just some disclosures, ought to receive protection, and the honorable Court has made statements indicating that disclosures within an employee's chain of command should receive protection, Federal Circuit jurisprudence clashes with these interpretations of the law. Failing to incorporate *Marano v. Dep't of Justice*, 2 F.2d 1137, and *Watson v. Dep't of Justice*, 64 F.3d 1524, into the Federal Circuit's interpretation of *Huffman v. Office of Pers. Mgmt.*, 263 F.3d 1341, denies the efficacy of high Court precedence and stands in direct contradiction to *Waters*.

A. Factual Background

Respondent Department of the Navy operates Naval Computer and Telecommunications Station (NCTS) Cutler on an environmentally sensitive peninsula in East Machias, Maine overlooking intertidal clam flats and fishing grounds. NCTS has taken on a project to strip and repaint Very Low Frequency (VLF) radio towers and other associated structures at the East Machias site. The Department of the Navy is legally bound to follow federal environmental laws and their whistleblower clauses.

Petitioner Normand Laberge is a GS-12 Environmental Engineer at NCTS Cutler. Laberge is responsible "to ensure Cutler's compliance with all Navy, Environmental Protection Agency (EPA), and Maine Department of Environmental Protection (DEP) laws and regulations." Laberge uses contacts to bring NCTS Cutler into compliance with all environmental laws and regulations and "to conduct surveys, investigations, gather data with which to base decisions and actions in the resolution of specific problems." Laberge also uses contacts "to inform higher authority, command and NCTS officials."

For the VLF project, Laberge was responsible for preparing documentation needed to comply with the National Environmental Policy Act (NEPA). Laberge made disclosures within and apart from his chain of command at NCTS Cutler concerning NEPA and the Maine DEP regulations on soil levels of polychlorinated biphenyls (PCBs). NEPA and the Maine DEP regulations required the Navy to issue Environmental Assessments and Environmental Impact Statements if

the VLF project released certain levels of PCBs into the soil. The VLF project was releasing PCBs in excess of that level.

Lieutenant Commander (LCDR) Roger Wakeman, Laberge's second-line supervisor, restricted Laberge's access to the VLF site after Laberge disclosed the compliance problems. Laberge refused to comply with that restriction. On June 17, 1999, LCDR Wakeman issued Laberge a letter of reprimand for whistleblowing and for violating the restriction.

Petitioner Laberge filed a timely request for review with the Merit Systems Protection Board (MSPB). The MSPB concluded that Laberge's disclosures were not protected by the Whistleblower's Protection Act (WPA). The Court of Appeals for the Federal Circuit affirmed the MSPB's decision.

B. The Merit Systems Protection Board's Decision

The Merit System Protection Board concluded that the WPA did not protect Laberge's disclosures because they occurred during his normal job duties and through normal channels. The agency used *Huffman v. Office of Personnel Mgmt.*, 263 F.3d 1341, to show that such disclosures do not receive protection under the WPA.

C. The Court of Appeals' Decision

The Court of Appeals issued a R. 36 affirmance without opinion of the Merit Systems Protection Board's decision.

REASONS FOR GRANTING THE WRIT

1. Whether the Federal Circuit erred in issuing a Rule 36 decision in this case, Laberge v. Department of the Navy, given that Merit Systems Protection Board (MSPB) Member Slavet's concurrence in Laberge v. Department of the Navy raised a significant question regarding the Federal Circuit precedence.

Laberge maintains that *Huffman* must be read in line with *Marano* (1993) and *Watson* (1995), which although pre-dating either *Willis* or *Huffman*, recognize that a protected disclosure can be made as part of one's official duties. *Huffman*, 263 F.3d at 1341, *Meuwissen v. Dep't of Interior*, 234 F.3d 9 (2000), and the gloss imparted to *Huffman* case law by the remaining rules in *Willis v. Dep't of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998); *Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993); and *Watson v. Dep't of Justice*, 64 F.3d 1524, 1526 (Fed. Cir. 1995).

In *Marano*, the court found that "the WPA ... applies to the situation where a government employee discloses information that is closely related to the employee's day-to-day responsibilities." *Marano*, 2 F.3d at 1142. Likewise, in *Watson*, the court held that, although the agency required disclosure of misconduct and the disclosure occurred through normal channels, the disclosure still received WPA protection.

Huffman, by contrast, established three categories of "normal duties" which establish the baseline for determination of whether a disclosure is protected: (1) disclosures an employee makes as part of his/her normal duties through normal channels

(unprotected); (2) disclosures an employee makes as part of his/her normal assigned duties but outside of normal channels (protected); (3) disclosures an employee makes that are not part of the employee's assigned duties (protected). *Huffman*, 263 F.3d at 1352-1355. Exempting the first category from protection conflicts with the rules established by *Marano* and *Watson*. In error, the court reconciled the cases by describing the prior "normal duties" rulings in *Marano* and *Watson* as dicta. *See*, *Laberge*, 91 M.S.P.R. at P5 (Slavet, concurring). However, if the *Huffman* rule were applied to either *Marano* or *Watson*, these cases would have held Marano's and Watson's disclosures unprotected. As such, the finding that WPA protection extended to one's official duties is not mere dicta, but rather provides essential support to both the Marano and Watson holdings.

Member Slavet's concurrence explains that it is questionable whether these cases can be reconciled and that the controlling Federal Circuit precedent remains unclear. *See*, *Laberge*, 91 M.S.P.R. 585 (Slavet, concurring). The Federal Circuit in its affirmance failed to clarify Federal precedent. The Honorable Court in taking this case can bring closure to the chaotic state of precedent related to whistleblower protection under the WPA.

2. Whether the Panel opinions are directly contrary to Congress's legislative mandate in the Whistleblower Protection Act of 1989.

It is entirely proper to consider subsequent legislative action, or the interpretation which the legislature subsequently places on a statute, to

determine a statute's meaning. 73 Am. Jur. 2d *Statutes* § 94. "These legislative interpretations are in fact entitled to great weight in resolving ambiguities and doubt." *Id.* Lawmakers have repeatedly expressed frustration over the courts' refusal to strictly enforce the WPA. Congress expressed its intent to change the courts' behaviors when it amended the Civil Service Reform Act (CSRA) of 1978, 5 U.S.C. § 2302, and the WPA in 1989 and 1994.[1] In addition, Subcommittee Chairman Frank McCloskey's statements at the floor debate, carry some weight, as McCloskey sponsored the bill. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 201 (1983).

The CSRA, 5 U.S.C. 2302, and the major amendment to that law, the Whistleblower Protection Act ("WPA") of 1989, 5 U.S.C. § 1221, are Congress's mandates to protect employee whistleblowers. The panel decision by the Federal Circuit runs directly contrary to this mandate as evidenced by legislative history.

The WPA modified the CSRA in several significant ways. First, it gave employees expanded personal and subject matter jurisdiction for MSPB hearings. Whistleblowers could now defend themselves

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[1] By the late 1980s, Congress recognized that the CSRA's "well-intentioned efforts to protect whistleblowers ha[d] thus far had little effect," S. Rep. No. 100-413, at 5 (1988). Senator Levin, in response to the MSPB's finding that the fear of reprisal for whistleblowing had doubled since the CSRA, stated, "These statistics are a clear sign that the system has not worked as intended and needs to be improved." 134 Cong. Rec. 19,981 (1988).

without having to depend on the Special Counsel's willingness to litigate, as they had to under the CSRA. Also, under the WPA, any listed personnel action in § 2302(b)(8) is subject to a board hearing, not just the more severe disciplinary actions that fell under the old law. The WPA thus gave employees full due process rights against "lesser" forms of harassment such as reprimands and removal of duties.

The WPA also expanded the scope of protected disclosures. Under the CSRA, only disclosures of an illegality or a specified misconduct were protected. The OSC, the MSPB, and the Federal Circuit all had interpreted the CSRA to protect only significant whistleblowing disclosures and to protect them only on a discretionary basis. The WPA amended 5 U.S.C. § 2302(b)(8) by substituting "*any* disclosure" (emphasis added) for "a disclosure." The Senate Committee on Governmental Affairs cautioned the MSPB and the courts to avoid the bureaucratic tendency to over-define the nature of a disclosure and thereby exclude communications that Congress intended to protect.[2]

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[2] S. Rep. No. 100-413, at 13 (noting that "[t]he Committee intends that disclosures should be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. [The Senate bill] emphasizes this point by changing the phrase 'a disclosure' to 'any disclosure' in the statutory definition.")

The WPA amendments in 1989 tried to ensure a process that would encourage federal employees to disclose evidence of waste, fraud, and abuse of authority. Yet Congress had to make further amendments in 1994 because "the WPA ha[d] created new reprisal victims at a far greater pace than it [had] protected them." H.R. Rep. No. 103-769, at 12 (1994).[3] The legislative history rejected numerous MSPB and Federal Circuit decisions as illegal under the WPA because they "represented a steady attack on achieving the legislative mandate for effective whistleblowing protection." H.R. Rep. No. 103-769, at 17.[4]

Congress expressed frustration that it could not clarify or expand the scope of protected disclosures any further than it already had. It stated, "Perhaps the most troubling precedents involve the [MSPB's] inability to understand that 'any' means 'any.' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind." *Id.* at 18. So a "protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside

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[3] *See* 5 U.S.C. § 2302(a)(2)(A)(xi)(1994) (increasing subject matter jurisdiction for whistleblowers by adding a catchall clause the effectively banned discrimination through "any other significant change in duties, responsibilities, or working conditions."); 140 Cong. Rec. H11419 (1994) statement of Rep. McCloskey, (noting that"[t]his personnel action [was] intended to include any harassment or discrimination that could have a chilling effect on whistleblowing.")

[4] *See Id.* (noting that since FY 1991 whistleblowers had only won 5 percent (5%) of decisions on the merits.)

or outside the agency, without restriction on time, place, motive or context." 140 Cong. Rec. H11419 (statement of Rep. McCloskey).

Congress's expansion of the Act to include any disclosure allows the WPA to embrace Petitioner's disclosures. Disclosures within the chain of command receive protection under the legislation's classification of "any" disclosures as protected. *103 Stat. 16.* MSPB Member Slavet agreed that the legislative language and intent require "any" disclosure to include those within the chain of command, within the scope of normal duties.[5] Although Member Slavet agreed with the majority that *Huffman* required the Court to define Laberge's disclosures as unprotected, the Judge enunciated her objection to a conclusion necessitated only by prior precedent when that precedent conflicts with the letter and intent of the statute itself. In *Ganski*, the majority of the MSPB ruled that a Park Superintendent did not engage in protected disclosure when the complainant complained to a second-line supervisor of gross mismanagement within the National Park Service. *Ganski v. Dep't of the Interior*, 83 M.S.P.R. 301 (1999). Slavet dissented, interpreting the legislative history of the WPA to indicate that "the plain language of ... [the WPA] ... leaves no room for the majority's holding that some disclosures of violations of law, rule, or regulation are not protected." *Id.* at 7. Although Slavet concurred with the

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[5] *Laberge v. Dep't of the Navy*, 91 M.S.P.B., p. 5 (Board Member Slavet, concurring) (noting that "[a]pplying the clear statutory language in light of the WPA's purpose should lead to the conclusion that the appellant engaged in statutorily-protected whistleblowing.")

judgment in *Huffman*, then, her dissent in *Ganski* indicates support for protection of Laberge's disclosure.

Any reasonable reading of the WPA's legislative history will reveal Congress's intent to expand protection and to make that protection meaningful. The amendments made since the original passage of the CSRA in 1978 have expanded personal and subject matter jurisdiction for employees, lessened the burden of proof on whistleblowers, and increased the scope of activities that are afforded whistleblower protection. These changes, which further encourage whistleblowing and afford it increased protections, are evidence that our lawmakers deem whistleblowing a necessity and a beneficial element of our society.

The WPA has many ambiguities and its meaning has been tortured in the courts. Thus, the Court should consider the legislative history before it newly interprets the Act.

3. Whether the Panel opinions are directly contrary to the U.S. Supreme Court's interpretation of Congress's legislative mandate in the Whistleblower Protection Act of 1989.

Since 1982, the United States Supreme Court has granted only twenty-one (21) petitions for writ of certiorari filed on cases before the U.S. Court of Appeals for the Federal Circuit. The high Court has never issued an opinion on a case involving the Whistleblower Protection Act of 1989, as that act has been interpreted by the Federal Circuit. Nonetheless, the high Court has detailed the exact relationship between the federal employee, the WPA, and the First

Amendment's protection of employee speech. Unless the Federal Circuit's case law includes *Marano* and *Watson*, as that law could be read through *Huffman*, the Federal Circuit directly contradicts high Court precedence in *Waters v. Churchill.* [6]

When fashioning a restriction on speech – such as the *Huffman* opinion – the federal Government may craft restrictions broader than those permitted in the private work place. In crafting such restrictions, however, the high Court underscores the external direction of these regulations – as in dealing with the public – or the internal necessity, as in maintaining discipline. What the high Court does not anticipate is the Federal Circuit's use of restrictions on the Whistleblower Protection Act of 1989 to curtail the free speech of federal employees, acting pursuant to their duties, and revealing failures in the assessment, inspection and compliance activities of the U.S. Government. Yet the Federal Circuit promotes a

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[6] *Waters v. Churchill*, 511 U.S. 661, 671-672 (1994), stating that "...the government as employer indeed has far broader powers than does the government as sovereign *See Pickering*, 391 U.S. at 598; *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973)...even many of the most fundamental maxims of our First Amendment jurisprudence cannot reasonably be applied to speech by government employees. The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' as 'necessary side effects of ... the process of open debate.' *Cohen v. California*, 403 U.S. 15, 24-25, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). But we have never expressed doubt that a government employer may bar its employees from using Mr. Cohen's offensive utterance to members of the public or to the people with whom they work."

regime of just such restrictions in what the Federal Circuit has encouraged through its precedent in *Huffman*.

Here, in the high Court's precedence, is case law affirming that discipline and action within one's chain of command are the hallmarks of the federal concern with speech in its own operations. The ill-guided informing of individuals outside the chain of command, though promoted by *Huffman* absent the gloss of *Marano* and *Watson*, goes against the aims endorsed by High Court precedent. Employees like Laberge, who are part and parcel of an inspection process, are the type of employees the high Court encourages.

Communications within the chain of command are exactly the opposite of the type of communications the court distinguished as unprotected. Employees who abide by the traditional hierarchy of federal service are precisely the ones who ought to be encouraged. By contrast, the disruptive employee – one acting now under *Huffman* as it is not informed by *Watson* and *Marano* – fit the profile of the allowable restriction in *Waters*.[7]

Waters provides the juridical linkage between the First Amendment concerns, *supra*, and the

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[7] *Waters*, 511 U.S. at 672, noting that "though a private person is perfectly free to uninhibitedly and robustly criticize a state governor's legislative program, we have never suggested that the Constitution bars the governor from firing a high-ranking deputy for doing the same thing. *Cf. Branti v. Finkel*, 445 U.S. 507, 518, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980)."

Whistleblower Protection Act of 1989.[8] The WPA is supposed to provide the balance between employee speech rights and the tolerable level of 'disruption' permitted under *Pickering*. By excluding *Marano* and *Watson* from the gloss informing *Huffman*, the Federal Circuit is denying the efficacy of high Court precedence and directly contradicts *Waters*.[9]

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[8] *Id.* at 673-674, noting that "we have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large. Few of the examples we have discussed involve tangible, present interference with the agency's operation ... One could make a respectable argument ... that high officials should allow more public dissent by their subordinates, *see* ... Whistleblower Protection Act of 1989, 103 Stat. 16, ... But we have given substantial weight to government employees' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential. *Compare, Letter Carriers, supra*, at 566-567, *with Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 129, 106 L. Ed. 2d 93, 109 S. Ct. 2829 (1989); *Texas v. Johnson*, 491 U.S. 397, 409, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)."

[9] *Waters*, 511 U.S. at 674, noting that "[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. *Pickering, supra*, 391 U.S. at 572. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. *See e.g., Rankin v. McPherson*, 483 U.S. 378, 388, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987); ... *Pickering, supra*, 391 U.S. at 569-571. Moreover, the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First

As the opinion in *Waters* finishes the relevant discussion: "The key to First Amendment analysis of government employment decisions, then, is this: The government's interest is in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as a sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate." *Huffman* does not guide the conduct of disclosures under the Whistleblower Protection Act of 1989 in this manner. *Huffman* contradicts *Waters*.

4. Whether -- irrespective of the confusion caused by Huffman -- Petitioner's disclosure is protected under Huffman, Marano, Watson and Willis.

Irrespective of the confusion created by *Huffman*, Laberge's disclosures still qualify as protected under the non-contradictory guidance proffered by the Federal Circuit in *Marano*, *Watson*, *Willis*, and *Huffman*. Taken as a whole, disclosures are protected if they (1) are made outside of normal duties or normal channels; (2) are issued to persons in a position to correct the alleged wrongdoings; (3) are done so at risk to one's job security for the advancement of the public good. In Willis, Appellant Willis failed because he did not show an intent to raise

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Amendment, values central to our social order as well as our legal system. *See e.g.*, Whistleblower Protection Act of 1989, *supra*.

the issue to persons in a position to correct the alleged wrongdoings nor did he risk his job security for the advancement of the public good by disclosing abuses by government personnel. *See, Willis*, 141 F.3d 1143, 1444. By contrast, Laberge's disclosures meet each of these criteria even where Willis' disclosures failed.

First, Laberge's disclosures were made outside of his normal duties. Laberge's job is to provide "guidance" and not to provide for the enforcement of environmental rules, laws, and/or regulations. Laberge's Position Description does not describe his duty in terms of making enforcement decisions pursuant to the National Environmental Policy Act of 1969 or hazardous waste management oversight, enforcement or compliance. His duties are to draft Environmental Assessments and Environmental Impact Statements when he determines they are required. If the base commander at NTCS Cutler decides to superimpose his reading of the environmental laws on Laberge's, then the 'duty' in question is transferred to the primary jurisdiction of the Council for Environmental Quality ("CEQ") or U.S. Environmental Protection Agency, Region 1, ("EPA") in making the final and authoritative determination of when an Environmental Assessment or Environment Impact Statement is required. By placing himself in the shoes of the CEQ -- which also has primary jurisdiction over the National Environmental Policy Act of 1969 – Laberge was performing duties not anticipated by his position description and outside his delegated job authority.

Huffman cannot be construed to restrict disclosures merely because individuals are involved

with activities related to the disclosure as part of their normal duties; to do so would invalidate any disclosure, especially by employees in a managerial professional staff position exposed to many levels of activity, because, in order to become aware of a transgression, one must be exposed to the transgression through his/her job activities. Professionals are in positions of unique awareness. The fact that Laberge became aware of the transgressions as a result of his job duties does not preclude protection. Instead, unprotected disclosures under Huffman occur only when the specific disclosures themselves are a part employee's normal work assignment. *See, Comito v. Dep't of the Army*, 90 M.S.P.R. 58, PP10-11 (2001), *Sutton v. Dep't of Justice*, 94 M.S.P.R. 4, P11.

Once Laberge's supervisor redistributed to the CEQ or the EPA the duty to make a final and authoritative determination whether an Environmental Assessment or Environment Impact Statement was needed, the disclosures themselves were no longer a part of Labarge's normal work assignment. After the transfer of duty, the subsequent disclosures moved from the realm of exemptions to that of protection under WPA outlined in *Huffman*. *See, Huffman*, 263 F.3d at 1352.

Laberge's disclosures were also protected because Laberge made his disclosures outside of normal channels. By disclosing to five separate parties, particularly to Robert Ostermuller of the NAVFAC Environmental Planning team, Laberge indicated a desire to disclose to others beyond his direct supervisor, who, as in Huffman, was the individual directly committing the wrongdoing. *See, Id.* at 1344.

Laberge's situation is similar to that of Complainant Eugene Johnson in *Johnson v. Health and Human Servs.*, where Johnson's duties as a professional required him "to report suspected contract irregularities to agency authorities." *Johnson v. Health and Human Servs.*, 2002 MSPB LEXIS 1136, 11. In *Johnson*, the Court applied *Huffman* to define as protected under the WPA disclosures employees make outside their chains of command when they feel that individuals within the chain of command have failed to respond.[10] *Id.* Similarly, Laberge, recognizing that his direct supervisors were unresponsive to his initial disclosures repeatedly contacted Ostermuller, an individual outside of normal channels affording his disclosures protection under the WPA as interpreted by *Johnson* and *Huffman.*

The need for the Honorable court to clarify what constitutes protected disclosures through "normal channels" is especially evident within the context of this case, in which the Petitioner is an employee of the Department of Defense ("DOD"). Surely, *Huffman* should not be construed as forbidding any disclosure within an individual's chain of command. To do so would forbid any disclosure by a DOD employee other than those made through highly public media. Given

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[10] As an example of a disclosure "clearly" protected by the WPA, the court described a law enforcement officer responsible for investigating crime by government employees who, "feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels." *Id.* In this regard, the court did not state or suggest that there was any requirement of an objective showing that a reasonable person would have believed it was necessary to proceed in such a fashion. *Johnson v. Health and Human Servs*, 2002 MSPB LEXIS 1136 at 11.

the sensitive nature of DOD information, this consequence – frustrating employee reliance on the chain of command structure fundamental to DOD operations – is undesirable. To avoid such a debacle, this court should seize the opportunity to clarify *Huffman* by bringing it more in line with the precedents of *Marano*, *Watson*, and *Willis*, protecting disclosures to individuals not directly responsible for the wrongdoing or individuals in a position able to rectify the wrongdoing.

Finally, Laberge's disclosures fulfill the two litmus tests established in *Willis*. Laberge's various disclosures were intended to correct wrongdoings, as Laberge believed that even his disclosures to the wrongdoers themselves were directed toward those in the best situation to remedy the wrongdoing. Laberge's disclosures were not made merely to one first-line supervisor as in *Huffman*, but to a series of officials in a position to correct the violation of rule, law or regulation: Commander John Mikell, LCDR Roger Wakeman, Captain Glidden, Mr. Robert Leclerc, and Mr. Robert Ostermueller. Further, Laberge's disclosures are more closely analogous to those made in *Price v. NASA*, where the court determined that disclosures by appellant to his supervisor were protected under the WPA, than to those in *Huffman*. [11]

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[11] *Price v. NASA*, 83 M.S.P.R. 661, P8 (1999). "The appellant's disclosure was not to a person without authority to remedy the alleged wrongdoing. It is undisputed that the practice that the appellant alleged was dishonest and illegal was embedded in the agency's accounting practices, and there is no evidence that the appellant's supervisor had responsibility for those accounting practices. It was, therefore, appropriate for the appellant to first make his disclosure to his supervisor. She was in a position to

Similarly, Laberge made disclosures to Robert Ostermuller of the NAVFAC Environmental Planning team, someone not responsible for the wrongdoing being disclosed, requesting that NAVFAC perform an Environmental Assessment, a concise public document. Laberge was therefore reasonable in making his disclosure to NAVFAC given that NAVFAC was capable of remedying the wrongdoing by conducting an Environmental Assessment and exposing the wrong doing using a public medium.

Laberge met the second component of the Willis standard because he disclosed at the risk to his job, in order to further the public good. Laberge's Letter of Reprimand outlining his "misconduct" not only provides evidence of his disclosures being outside his normal job duties, but, it provides credence to the claim that his action placed his job in peril.

The Honorable court can therefore rectify the erroneous lower court application of the rules established in *Marano*, *Watson*, *Willis*, and *Huffman* in this case.

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forward his concerns to higher authorities who were in a position to act to remedy the alleged wrongdoing."

CONCLUSION

The petition for a writ of certiorari should be granted.

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(Any footnotes trail the end of each document)

02-3352

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMAND LABERGE,
Petitioner,
v.

DEPARTMENT OF THE NAVY,
Respondent.

June 6, 2003, Decided
June 6, 2003, Filed

JUDGES: LOURIE, RADER, and DYK, Circuit Judges.

OPINION: JUDGMENT

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

PER CURIAM:

AFFIRMED. See Fed. Cir. R. 36.

02-3352

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NORMAND LABERGE,
Petitioner,
v.

DEPARTMENT OF THE NAVY,
Respondent.

August 22, 2003, Decided
August 22, 2003, Filed

OPINION:

ORDER

A petition for rehearing en banc having been filed by the petitioner, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is
ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 29, 2003.

DOCKET NUMBER BN-1221-00-0122-W-1

MERIT SYSTEMS PROTECTION BOARD

NORMAND LABERGE,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

June 14, 2002

OPINIONBY: ROBERTS, JR.

OPINION: BEFORE

Susanne T. Marshall, Acting Chairman
Beth S. Slavet, Member

Member Slavet issues a separate concurring opinion.

OPINION AND ORDER

The appellant has filed a timely petition for review of the initial decision that dismissed his individual-right-of-action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.118, however, and AFFIRM the initial decision as MODIFIED by this Opinion and Order, still DISMISSING the appeal for lack of jurisdiction.

BACKGROUND

The appellant is a GS-12 Environmental Engineer at the Naval Computer and Telecommunications Station Cutler, East Machias, Maine (Cutler). Initial Appeal File (IAF), Tab 5, subtab 4A. He filed an IRA appeal alleging that Public Works Officer LT Roger Wakeman issued him a June 17, 1999 letter of reprimand in reprisal for whistleblowing. IAF, Tab 1. The administrative judge conducted a hearing after finding that the appellant had made a nonfrivolous allegation of Board jurisdiction. But he ultimately dismissed the appeal for lack of jurisdiction. Specifically, he found that the appellant failed to prove that he made a protected disclosure because he did not show that a reasonable person in his position would believe that the matters he reported evidenced a violation of environmental laws and regulations or a gross waste of funds. Initial Decision (I.D.) at 1-18.

The appellant has filed a petition for review, to which the agency has not responded.

ANALYSIS

Under Geyer v. Department of Justice, 63 M.S.P.R. 13, 16-17 (1994), the Board has jurisdiction over an IRA appeal if the appellant shows by preponderant evidence that: (1) he engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and (3) he raised the issue before the Office of Special Counsel (OSC), and proceedings before the OSC were exhausted. In Yunus

v. Department of Veterans Affairs, 242 F.3d 1367, 1371-72 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit set forth different jurisdictional criteria for IRA appeals than that set forth in Geyer. The court stated that "the Board has jurisdiction over an IRA appeal if the appellant has exhausted his administrative remedies before the OSC and makes 'non-frivolous allegations' that (1) he engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a)." Id. at 1371. We need not decide whether to follow the Geyer or the Yunus standard here because we find that the appellant failed to satisfy either standard. Cf. Shriver v. Department of Veterans Affairs, 89 M.S.P.R. 239, P5 (2001) (finding that the Board need not decide whether to follow the Geyer or the Yunus standard because the appellant satisfied the jurisdictional criteria under both standards).

The June 17, 1999 letter of reprimand was a personnel action under 5 U.S.C. § 2302(a)(2)(A)(iii). See, e.g., Mc Vay v. Arkansas National Guard, 80 M.S.P.R. 120, 123 (1998). In addition, the record shows that the appellant raised the issue and exhausted his administrative remedies before the OSC. IAF, Tab 1, Att. 1. The administrative judge made those findings in his August 4 and 30, 2000 orders. IAF, Tabs 10 at 2, 13 at 3. We find, though, that the appellant did not engage in whistleblowing by making protected disclosures.

Essentially, the appellant alleged that his protected disclosures involved communications with the Command at Cutler regarding environmental

compliance issues related to a project to strip and re-paint radio towers. Specifically, he alleged that his disclosures included the following: (1) informing the Command that it should have notified the Maine Department of Environmental Protection that it had discovered polychlorinated biphenyls (PCBs) in the soil surrounding the project site at which paint had been stripped from radio towers; (2) informing the Command that it should conduct further Environmental Assessments on the project's impact, after it discovered that the contractor performing the project could not fully contain the PCBs; and (3) suggesting that the Northern Division, Naval Facilities Engineering Command (NAVFAC) should conduct an Environmental Assessment of the project. I.D. at 12-13.

Reports made as part of an employee's assigned normal job responsibilities, when made through normal channels, are not covered by the Whistleblower Protection Act. Huffman v. Office of Personnel Management, 263 F.3d 1341, 1351-55 (Fed. Cir. 2001). Here, although the appellant may have reasonably believed that he was disclosing violations of environmental laws or regulations, his actions were within the duties described in his position description. IAF, Tab 11, Subtab 1. The appellant's position description stated, "The incumbent serves as the environmental and natural resources program manager to ensure NCTS Cutler's compliance with all Navy, Environmental Protection Agency, and Maine Department of Environmental Protection laws and regulations." Id. The appellant's major duties and responsibilities included providing "authoritative guidance to the NCTS Cutler commanding officer, departments and remote activities on ... the

interpretation of environmental laws, regulations, standards, policies and directive concerning same." Id. Under Factors 6 and 7 in his position description, the appellant's contacts included "other environmental engineers/specialists, government environmental officials, procurement personnel, subject matter experts, officials, activity commanding officers, [and] officials in the [Environmental Protection Agency] and high command authority." The purpose of those contacts was to explain the function of Cutler's environmental protection program "so as to be in compliance with all respective federal, state, local and inter-agency regulations, codes and permits. ..." Id.

Admittedly, the Board has found protected a Supervisory Financial Administrator's disclosures of cost overruns in an agency program and unauthorized billing practices, even though the Administrator became aware of the problems while performing her responsibilities. Comito v. Department of the Army, 90 M.S.P.R. 58, PP3, 10 (2001). But in that case, reporting the problems was not part of her normal duties. Id., P10. Unlike the record in Comito, the record here shows that reporting the type of problems that the appellant brought to the agency's attention was part of his normal, assigned duties. Thus, by advising the Command and NAVFAC of his concerns regarding the agency's compliance with federal and state environmental statutes and regulations in implementing the project to re-paint the radio towers, the appellant was merely performing his normal duties. That is, he was investigating and reporting wrongdoing as part of his normal duties through normal channels. See, e.g., Huffman, 263 F.3d at 1352; Willis v.

Department of Agriculture, 141 F.3d 1139, 1144 (Fed. Cir. 1998).

For the above reasons, we conclude that the appellant failed to prove that he made a disclosure covered by the Whistleblower Protection Act. Accordingly, we dismiss his IRA appeal for lack of jurisdiction.

ORDER

This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held

that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. See Pinat v. Office of Personnel Management, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other related material at our web site, http://www.mspb.gov.

FOR THE BOARD:

Bentley M. Roberts, Jr.
Clerk of the Board

Washington, D.C.

CONCURBY: SLAVET

CONCUR:

CONCURRING OPINION OF BETH S. SLAVET
in Normand Laberge v. Department of the Navy
MSPB Docket No. BN-1221-00-0122-W-1

I concur in the Board decision to deny the appellant's request for corrective action under the Whistleblower Protection Act of 1989 (WPA) because I agree that the evidence established that the appellant made his disclosures through normal channels as part of his normal assigned duties, and the Federal Circuit has interpreted the WPA to deny protection to such

disclosures. However, for the reasons set forth below, I believe the WPA should be interpreted as providing protection to the disclosures the appellant made in this case.

From my perspective, the rule governing this case is found in Huffman v. Office of Personnel Management, 263 F.3d 1341 (Fed. Cir. 2001). In Huffman, as I read it, the court revisited the discussion of "normal duties" disclosures it originally addressed in Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998). Willis involved a District Conservationist who, as part of his normal assigned duties, reported various farms out of compliance with Department of Agriculture soil conservation plans. In concluding that Willis' reports did not constitute disclosures protected by the WPA, the Federal Circuit stated that the WPA "is intended to protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel," and it found that Willis' compliance reports did not place him "at personal risk for the benefit of the public good." Willis, 141 F.3d at 1144. However, in reaching this conclusion, the court differentiated Willis' case from Marano v. Department of Justice, 2 F.3d 1137, 1142 (Fed. Cir. 1993) in which the court stated that the WPA "applies to a situation where a government employee discloses information that is closely related to the employee's day- to-day responsibilities."

Likewise, in Watson v. Department of Justice, 64 F.3d 1524, 1526 (Fed. Cir. 1995), the court addressed the case of a border patrol agent who was removed for, inter alia, his reporting the wrongdoing of another agent in

an untimely manner in violation of agency policy. Despite the fact that Watson's reporting of another agent's misconduct was required under agency policy, the final Board order found that the appellant had made protected disclosures that contributed to his removal, but it also found that the agency had carried its burden of proving that it would have taken the same action in the absence of the appellant's protected whistleblowing. Id. at 1527. In affirming the Board decision, the court stated, "The fact that a protected disclosure may be made as part of an employee's duties, but that an employee may nevertheless be disciplined for violating agency policy if his disclosure is untimely, strikes a balance between the intent of the WPA and the agency's interest in prompt disclosure of wrongdoing." Id. at 1530. Thus, prior to the issuance of Huffman, Willis could have been read as merely creating an exception to the more general rule, addressed in Marano and Watson, that disclosures made as part of an employee's assigned duties are protected by the WPA.

In Huffman, however, the court further refined the parameters of the "normal duties" rule by setting forth the following three categories: (1) disclosures an employee makes as part of his normal duties through normal channels; (2) disclosures an employee makes as part of his normal assigned duties but outside of normal channels; and (3) disclosures an employee makes that are not part of the employee's assigned duties. Huffman, 263 F.3d at 1352, 1354. With respect to disclosures that fall within the first category, the court concluded that such disclosures are not protected by the WPA and stated, "While the language of the Act is ambiguous as to whether normal duties reports are covered, the core purposes of the WPA are simply not implicated by such reporting." Huffman, 263 F.3d at

1352. Thus, the Huffman panel appeared to expand the limited Willis exception for disclosures that do not put an employee's personal job security at risk for the public good to deny protection to all disclosures an employee may make through normal channels as part of his normal assigned duties.

In my mind, to find that the appellant was protected under both Willis and Huffman would require me to find that those cases are irreconcilable. And while I could then choose to follow Willis pursuant to the rule that when there is a conflict between decisions of the Federal Circuit, the precedential decision is the first decision that was issued, see Bosley v. Merit Systems Protection Board, 162 F.3d 665, 672 (Fed. Cir. 1998), the panel in Huffman described the prior "normal duties" rulings in Marano, Watson, and Willis as dicta. Therefore, I am bound by controlling Federal Circuit precedent to find that the appellant's disclosures made through normal channels as part of his normal assigned duties were not protected by the WPA. Yet, as discussed below, I believe that applying the clear statutory language in light of the WPA's purpose should lead to the conclusion that the appellant engaged in statutorily-protected whistleblowing.

The facts of this case revolve around the appellant's actions with respect to an agency project to strip and repaint Very Low Frequency (VLF) radio towers and other associated structures located on an environmentally sensitive peninsula in East Machias, Maine overlooking intertidal clam flats and fishing grounds. As stated in the Board's opinion, the appellant served as an environmental engineer who was responsible "to ensure NCTS [(Naval Computer and

Telecommunications Station)] Cutler's compliance with all Navy, Environmental Protection Agency, and Maine Department of Environmental Protection laws and regulations." Initial Appeal File (IAF), Tab 11, Subtab 1. In addition to the appellant's responsibility to ensure compliance with environmental laws and regulations, his position description also stated, "The failure of any station department or remote activities to comply with environmental laws and regulations could result in heavy fines and/or imprisonment for NCTS Cutler's commanding officer and/or other responsible personnel." Id. In identifying the scope and effect of the appellant's position, the position description stated:

The purpose of this position is to implement and administer a [sic] environmental and natural resources program on NCTS Cutler and all of its associated facilities remote from the station. Results of this work affect the working and living environments of installation occupants; the public within a reasonable distance surrounding the installation; and future generations. In addition, decisions and recommendations directly impact NCTS Cutler's mission and in some cases may affect national public relations.

Id. With respect to personal contacts, the position description indicated that such contacts would include other environmental engineers, government environmental officials, procurement personnel, subject matter experts, activity commanding officers, officials in the Environmental Protection Agency (EPA) and high command authority, architect-engineer firms, contractors, officials from local community government, and officials from federal, state, and local agencies

having regulatory and enforcement authority concerning installation activities that affect on and off base resources, air, land, water and the environment. Id. The position description identified the purpose of these contacts as follows:

Contacts are to explain the purpose and function of NCTS Cutler's environmental protection program so as to be in compliance with all respective federal, state, local, and inter-agency regulations, codes and permits and also, to conduct surveys, investigations, gather data with which to base decisions and actions in the resolution of specific problems. Contacts are used to inform higher authority, command and NCTS officials, as well as to keep abreast of current state-of-the-art; to represent and support NCTS Cutler policies and positions, to persuade, convince and encourage voluntary compliance for activities and labor, to elicit cooperation and support of professional, industrial, and labor and private groups and associations to enhance success of command programs; and to provide technical guidance and direction as required.

Id.

For construction projects such as the VLF tower project, the appellant was responsible for preparing documentation needed to comply with the National Environmental Policy Act (NEPA). n1 Based on a report in which a consultant assigned to the VLF tower project stated that the project would be completed under 100% containment of the paint chips, the appellant concluded that a Categorical Exclusion (CE) memorandum should be prepared. n2 The appellant apparently completed a CE form, but it was not signed

by the Commanding Officer. IAF, Tab 11, Subtab 3 at 17.

As the circumstances below indicate, the stripping project did not proceed as originally contemplated. In October and November, 1996, after the agency commenced stripping paint from a structure known as the South Helix House, polychlorinated biphenyls (PCBs), a hazardous substance contained in the paint that was to be removed during the VLF tower project, was discovered in soil samples taken around South Helix House at levels ranging from 1100 to 4500 parts per million (ppm). The Maine Department of Environmental Protection (DEP) regulations required reporting of the release of PCBs at a level of 1600 ppm, and the appellant notified the NCTS Cutler Commanding Officer, Captain Glidden, n3 and recommended that the agency either take additional samples to better quantify the extent of the contamination or immediately report the release to the Maine DEP. The agency did not take additional samples nor report the contamination to the Maine DEP; however, the painting contract was modified to include protective measures for PCB control and management and the project continued throughout the Spring and Summer of 1997.

In November, 1997, the appellant again reviewed the VLF tower project and submitted a report to the Northern Division, Naval Facilities Engineering Command (NAVFAC), n4 in which he recommended that "due to the inability to attain full containment, an environmental assessment [(EA)] study [n5] is advisable in order to outline potential impacts associated with the creation of more mobile

contaminants." IAF, Tab 1, Attachment 2 at 65. In December, 1997, NCTS Cutler notified the Maine DEP about the presence of PCBs in the soil around the South Helix House and the VLF towers that had been water-blasted to remove paint in 1997. Maine DEP requested clean-up action and the immediate termination of discharges from the structures. Around the same time, the Environmental Protection Agency (EPA) indicated that NCTS Cutler required an Alternate Method of Disposal Approval (AMDA) permit and that paint removal operations could not continue until the facility was in compliance with the Toxic Substances Control Act (TSCA) standards. n6 IAF, Tab 11, Subtab 3.

In September, 1998, EPA, the Maine DEP, NCTS Cutler, NAVFAC, and the VLF tower project contractor began to develop a work plan to complete the project and to address TSCA and Maine DEP regulations. In April, 1999, the appellant reviewed the work plan and recommended that an EA be performed. In an e-mail dated April 16, 1999, the appellant's second-line supervisor, Lieutenant Commander (LCDR) Wakeman, asked the appellant if he had contacted NAVFAC regarding the requirement to prepare additional NEPA documentation for completion of an existing project. IAF, Tab 5, Subtab E. In his response, the appellant explained that his original recommendation that an EA was not required was based on the fact that the original project specifications called for full containment, but he stated "the specifications should be different to indicate that full containment is no longer a requisite for the project and that past history indicates an added level of environmental oversight by regulatory agencies." Id.

The appellant subsequently contacted Robert Ostermuller of the NAVFAC Environmental Planning team and provided him with information concerning the VLF tower project. After reviewing this information, Ostermuller sent the appellant an e-mail in which he informed the appellant that, in his opinion, the project, even if containment had worked, did not fall within a categorical exclusion, that an EA should have been prepared, and that a work plan could be incorporated into an EA but would not eliminate the need to prepare an EA. IAF, Tab 1, Attachment 2, OSC Submission at 45. In his response to Ostermuller, the appellant agreed that the project did not fall within a categorical exclusion and acknowledged that "the fact than an EA or EIS has never been completed ... violates Navy policy under NEPA." Id. at 47-48. On May 28, 1999, the appellant sent an e-mail to the new Commanding Officer of NCTS Cutler, Commander Mikell, which contained the following:

Mr. Ostermuller agrees with my conclusion that an EA (or EIS) was and is necessary for the project... Please note that Mr. Ostermuller still believes that an EA or EIS is still required even with the approval of a work plan by EPA and Maine DEP on PCB issues. In my opinion, an EA or EIS should be performed before allowing [the contractor] to continue with the project. This measure should ensure that the proper U.S. Navy protocol has been followed for the review of environmental impacts associated with the project.

Id. at 47. On June 1, 1999, the appellant sent Ostermuller an e-mail in which he indicated that certain individuals at NCTS Cutler "would like to have our CO or your CO make a decision that would allow the

present contractor ... [to] continue the work this year without the benefit of an EA or EIS." Id. at 50. On June 7, 1999, the appellant sent another e-mail to Commander Mikell n7 in which he described his "problems with the VLF project," including:

the lack of appropriate response to the detection of PCBs in the waste from south Helix House in October 1996 and to the fact that the contractor was unable to provide full containment during May 1997. If the command had provided notification to Maine DEP in November or December 1996 on the detection of PCBs around the South Helix house, the project would have received a greater level of environmental oversight by regulators. This notification might have led to a revision of paint removal plans before the initiation of work in May 1997.

Id. at 58-59.

After setting forth these facts, the administrative judge concluded that the appellant failed to establish that he made a protected disclosure because the appellant failed to show that a disinterested observer with the knowledge available to the appellant at the time of his alleged disclosures could reasonably conclude that his disclosures evidenced any of the wrongdoing described in 5 U.S.C. § 2302(b)(8). Initial Decision (ID) at 16 - 18; see LaChance v. White, 174 F.3d 1378, 1381 (Fed. Cir. 1999) (test for determining whether disclosure is protected by 5 U.S.C. § 2302(b)(8) is whether "a disinterested observer ... [could] reasonably conclude that the actions of the government evidence" a kind of wrongdoing covered in that provision), cert. denied, 120 S. Ct. 1157 (2000). However, based on the evidence of

record, I would find that, at a minimum, the appellant established that a disinterested observer could reasonably conclude that his disclosures concerning the agency's failure to prepare an EA or an EIS after discovering that full containment was not possible and that the water-blasting operations to strip paint from the VLF towers resulted in the release of PCBs into the environment violated the CEQ and the Department of the Navy NEPA regulations.

Even if the appellant's original assessment that the VLF tower project fell within a categorical exclusion was correct based on the information he had available at the time, a disinterested observer in the appellant's position could have reasonably concluded that the discovery of PCBs at the work site required further NEPA analysis and documentation. According to the EPA, PCBs have significant deleterious ecological and human health effects. n8 The Department of the Navy regulations provide, "Even though a proposal generally fits the description set out below for categorical exclusions, the categorical exclusion should not be used if the proposed action: (1) Would affect public health or safety; ... or; (5) Threatens a violation of federal, state or local law or requirements imposed for protection of the environment." 32 C.F.R. § 775.6(e). Given the fact that the VLF towers were located on a peninsula in close proximity to clam flats and fishing grounds, ID at 3, and the fact that the soil samples included PCB measurements in excess of the Maine DEP regulations concerning reportable quantities, IAF, Tab 1, Attachment 4B at 64, a disinterested observer in the appellant's position could have reasonably concluded that a categorical exclusion was inappropriate under NEPA because the release of PCBs into the

environment during the project could affect public health or safety and threaten a violation of state or federal law. n9 Therefore, by advising the NCTS Cutler command and NAVFAC that the VLF tower project went forward without adequate NEPA documentation, the appellant disclosed information that he reasonably believed evidenced a violation of NEPA regulations issued by the CEQ and the Department of the Navy. See 5 U.S.C. § 2302(b)(8).

PCBs have significant ecological and human health effects, including carcinogenicity (probable human cancer-causing or cancer-promoting agent), neurotoxicity, reproductive and developmental toxicity, immune system suppression, liver damage, skin irritation, and endocrine disruption. These toxic effects have been observed from both acute and chronic exposures to PCB mixtures with varying chlorine content. PCBs do not break down readily in the environment, and are taken into the food chain by microorganisms. PCBs are then biologically accumulated and concentrated at levels much higher than found in the surrounding environment, thus posing a greater risk of injury to human health and the environment than might be imagined.

See http://es.epa.gov/oeca/ag/lsca.html#Polychlorinated Biphenyls (PCBs.)

The term "continuing activities" which may necessitate the preparation of a NEPA document will be applied by the Department of Navy to include activities which are presently being carried out in fulfillment of the Navy mission and function, including existing training functions, where: ... (2) There is a discovery that the

environmental effects of an ongoing activity are significantly and qualitatively different or more severe than predicted in a NEPA document prepared in connection with the commencement of the activity.

32 C.F.R. § 775.6(c).

Indeed, the agency did not dispute the fact that the appellant's belief that NCTS Cutler had violated environmental laws was reasonable. The administrative judge essentially found as much in an August 30, 2000 order and during a September 27, 2000 prehearing conference. IAF, Tabs 13, 22. Likewise, in its posthearing brief, the agency itself cited Commander Mikell's testimony that the agency agreed with the appellant's recommendations in 1999 and delayed work of the VLF tower project to conduct further NEPA analysis because it was the "right thing to do." IAF, Tab 26 at 2. Thus, the agency's reaction to the appellant's disclosures helped to establish the reasonableness of his beliefs. See, e.g., Arauz v. Department of Justice, 89 M.S.P.R. 529, P7 (2001) (citing the agency's failure to challenge the administrative judge's finding that the practice in question was a violation of law).

The appellant also submitted sufficient evidence to establish that his disclosures were a contributing factor in the personnel action at issue in this appeal, a June 17, 1999 letter of reprimand the appellant received from LCDR Wakeman for "Repeated Instances of Misconduct." IAF, Tab 5, Subtab 4F. n10 In this case, the appellant made his disclosures in several e-mail messages he sent to Commander Mikell, LCDR Wakeman, and Assistant Public Works Officer Leclerc in late-May through early-June, 1999. These messages

concerned the agency's failure to comply with NEPA when it was discovered that PCBs were present at the VLF tower project work site. Thus, there is no question that LCDR Wakeman knew of the appellant's disclosures. This fact, along with the fact that LCDR Wakeman issued the letter of reprimand within a few weeks of the appellant's disclosures, provides a sufficient basis for finding that the appellant established on the merits that his disclosures were a contributing factor in his reprimand. See Arauz, 89 M.S.P.R. 529, P11.

Generally, when the Board finds that a protected disclosure was a contributing factor in a personnel action, it will order corrective action unless the agency presents clear and convincing evidence that it would have taken the action absent the disclosure. 5 U.S.C. § 1221(e)(1), (2). In this case, however, because the administrative judge concluded that the appellant did not establish that he reasonably believed that the information he disclosed evidenced any of the categories of wrongdoing listed in 5 U.S.C. § 2302(b)(8), the administrative judge did not address whether the agency carried its burden of proving that it would have issued the letter of reprimand in the absence of the appellant's disclosures. However, as stated above, I would find under such circumstances that the appellant established that his disclosures evidenced a violation of the CEQ and Department of the Navy NEPA regulations and remand the appeal to the administrative judge for the issuance of a new initial decision and a determination as to whether the agency carried its burden of proof. See Arauz, 89 M.S.P.R. 529, P12.

Nevertheless, I find a remand in this case is unnecessary, because, despite the fact that the appellant established that he reasonably believed that the information he disclosed evidenced a violation of CEQ and Navy regulations, the appellant still failed to establish that his disclosures were protected under 5 U.S.C. § 2302(b)(8). The appellant's assigned job responsibilities included advising the command at NCTS Cutler, as well as procurement personnel such as NAVFAC, regarding compliance with environmental laws and regulations. Thus, the appellant's disclosures fell within the first category of disclosures identified by the Federal Circuit's decision in Huffman, and the appellant therefore failed to establish that he engaged in whistleblowing by making disclosures protected by the WPA.

In Coons v. Department of the Treasury, 85 M.S.P.R. 631 (2000) (Vice Chair Slavet, concurring) and in Huffman v. Office of Personnel Management, 84 M.S.P.R. 569 (1999) (Vice Chair Slavet, concurring), I wrote separately to express my view that, to the extent that the Federal Circuit decision in Huffman interprets the WPA to deny protection to the disclosures here, it is inconsistent with the protections Congress afforded employees in the WPA and its amendments. While the appellant's disclosures in this case fall within the first Huffman category, excluding them from WPA coverage, finding that these disclosures are protected by the WPA would serve the core purposes of that statute which the court identified in Willis. The appellant's assigned job responsibilities included identifying issues and advising the agency regarding its compliance with federal and state environmental laws and regulations. If the appellant failed to properly

identify issues and advise the agency, it could be found in noncompliance with the applicable laws and regulations. If the appellant identified agency noncompliance and advised the agency of necessary compliance steps, as he did here, but the agency ignored the situation, it could also be found to have violated the law. On the other hand, if the agency accepted the appellant's advice and implemented the appellant's recommendations, agency projects could have been subject to delays and/or required additional expense to complete. The appellant here alleged that his advice regarding the agency's need to comply with NEPA by preparing an EA when it was discovered that contractors who were stripping paint from the VLF towers were releasing PCBs into the surrounding soil should have resulted in the suspension of work and could have required the payment of damages to the contractor for the delay. IAF, Tab 1, Attachment 2B at 96-97.

Other evidence supports the view that with regard to the contributing factor test, the agency acted as if it perceived him a whistleblower. The appellant attached various documents to his appeal in which he had indicated that his position regarding the project was "unpopular" and did not receive "suitable support" from the command at NCTS Cutler. Id. at 106. Furthermore, despite the fact that the appellant's position description indicated that his personal contacts included contractors and that he was responsible "to conduct surveys, investigations, gather data with which to base decisions and actions in the resolution of specific [compliance] problems," IAF, Tab 11, Subtab 1, the appellant submitted documents in which he had alleged that LCDR Wakeman accused him of "spying" on the

contractors who were performing the paint removal, IAF, Tab 1, Attachment 2B at 106. The appellant also submitted documentation which indicated that after he disclosed compliance problems associated with the paint removal process, LCDR Wakeman restricted the appellant's access to the site where the work was being performed. Id. at 92. In his grievance n11 concerning the letter of reprimand he received regarding his failure to comply with this restriction and his conduct during a meeting in which he discussed the paint removal project with LCDR Wakeman and Mr. Leclerc, the appellant stated that he "immediately made a link" between the agency decision to stop the paint removal project pending completion of the NEPA documentation and the issuance of the letter of reprimand. Id. at 112. Thus, to the extent that agency compliance with environmental laws and regulations benefits the public, n12 the appellant presented evidence to suggest that he put his job security at risk for the benefit of the public when he disclosed what he reasonably believed were agency violations of NEPA regulations through normal channels as part of his assigned job responsibilities.

Therefore, at least with respect to the situation presented by this case, where the evidence suggests that the agency retaliated against the appellant for disclosures he made in the performance of his duties which provided a benefit to the public by ensuring that the agency complied with environmental laws and regulations designed to protect the public, the core purpose of the WPA that the court identified in Willis would be served by extending protection to the appellant's disclosures. Nevertheless, as mentioned above, reading Willis as providing only a limited

exception to Marano and Watson in cases in which the appellant does not place his personal job security at risk for the benefit of the public does not appear to be supported by the court's decision in Huffman. Therefore, despite the fact that the evidence suggests that the appellant placed his personal job security at risk for the benefit of the public, because the Federal Circuit's decision in Huffman does not provide an exception to the general rule that disclosures an employee makes through normal channels as part of his assigned job responsibilities are not protected by the WPA, I am bound by Huffman to find that the appellant did not engage in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8). Accordingly, I concur in the decision to dismiss the appellant's individual-right-of-action (IRA) appeal.

Date June 14, 2002
Beth S. Slavet
Member

Footnotes

n1 Essentially, NEPA requires federal agencies to consider the environmental impacts of a proposed action during the planning phase of the action, and, if the action is one which would significantly affect the quality of the human environment, to prepare an environmental impact statement (EIS) statement addressing the following: (1) the environmental impact of the proposed action; (2) any adverse environmental effects which could not be avoided if the proposal is implemented; (3) alternatives to the proposed action; (4) the relationship between local short-term use of man's environment and the maintenance and enhancement of

long-term productivity; and (5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. 42 U.S.C. § 4332(2)(C); see 40 C.F.R. § 1508.11 (defining "Environmental impact statement" as the "detailed written statement as required by section 102(2)(C) [(42 U.S.C. § 4332(2)(C))] of the Act."). According to the Department of the Navy regulations, an EIS is required if "the action is a major federal action significantly affecting the human environment." 32 C.F.R. § 775.6(a).

n2 Pursuant to the Council on Environmental Quality (CEQ) regulations implementing NEPA, a categorical exclusion is "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4. The Department of the Navy regulations provide, "Categorical exclusions are applicable to those kinds of Navy actions which do not significantly affect the quality of the human environment, which do not result in any significant change from existing conditions at the site of the proposed action, and whose effect is primarily economic or social." 32 C.F.R. § 775.6(e).

n3 Until February, 1998, the appellant's position was located in the Office of the Commanding Officer. From February 1, 1998 onward, the position was relocated to the Public Works Department where the appellant's immediate supervisor became Robert Leclerc,

Assistant Public Works Officer. Beginning in September, 1998, Lieutenant Commander (LCDR) Roger Wakeman was assigned as Public Works Officer and Commander John Mikell was assigned as Commanding Officer.

n4 Although the exact relationship between NCTS Cutler and NAVFAC is not readily apparent from the record, it appears that NAVFAC may have been the Navy component responsible for soliciting bids and awarding and administering the contract(s) for the VLF tower project.

n5 According to the CEQ regulations, an EA "means a concise public document for which a Federal agency is responsible that serves to: (1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary." 40 C.F.R. § 1508.9. The Department of the Navy regulations provide that an EA is appropriate when the action is one for which the impacts are not known or which may not be significant. 32 C.F.R. § 775.6(a).

n6 The EPA regulates the manufacturing, processing, distribution, and disposal of PCBs pursuant to its authority under TSCA to regulate chemical substances or mixtures that "present[] or will present an unreasonable risk of injury to health or the environment." 15 U.S.C. § 2605; see 40 C.F.R. Part 761.

n7 The appellant also sent this e-mail message, as well as the one he sent to Commander Mikell on May 28, 1999, to LCDR Wakeman and Assistant Public Works Officer Robert Leclerc.

n8 An EPA website describes the effects of PCBs as follows:

n9 Although the discovery of PCBs occurred after the planning stage of the VLF tower project, CEQ regulations define major Federal actions subject to evaluation under NEPA to include "new and continuing activities." 40 C.F.R. § 1508.18. The Navy regulations provide:

n10 A letter of reprimand is a personnel action under the WPA. See, e.g., McVay v. Arkansas National Guard, 80 M.S.P.R. 120, 123 (1998). An employee may demonstrate that a disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action knew of the disclosure and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. 5 U.S.C. § 1221(e)(1).

n11 Because the appellant filed his complaint with the Office of Special Counsel prior to filing his grievance, the appellant's grievance did not preclude the appellant from seeking corrective action under the election of remedies provision of 5 U.S.C. § 7121(g)(3).

n12 The purposes of NEPA are:

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321.

DOCKET NUMBER BN-1221-00-0122-W-1

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
BOSTON FIELD OFFICE

NORMAND LABERGE,
Appellant,

v.

DEPARTMENT OF THE NAVY,
Agency.

Filed February 23, 2001

Normand Laberge, Trescott, Maine, pro se.

Robert S. Knowles, Groton, Connecticut,
for the agency.

BEFORE John F. Markuns Administrative Judge

INITIAL DECISION

On April 24, 2000, the appellant, who occupies the position of Environmental Engineer, GS-819-12, Naval Computer and Telecommunications Station Cutler (Cutler), East Machias, Maine, filed an individual right of action (IRA) appeal with the Merit Systems Protection Board ("MSPB" or "Board") alleging, inter alia, that on June 17, 1999, the agency issued him a letter of reprimand for "Repeated Instances of Misconduct" in reprisal for whistleblowing.fn1 Following a determination that the appellant had

presented a nonfrivolous allegation that the Board had jurisdiction over the appeal, a hearing was conducted at the appellant's request. Appeal File (AF), 13. For the reasons below, the appellant's request for corrective action is DISMISSED.

JURISDICTION

Background

The essential background facts are reflected in undisputed documents contained in the record and corroborating testimony. NAVCOMTELSTA Cutler is a major communications facility, providing radio signal transmissions to U.S. ships and submarines. At the time of the events in question, the appellant was employed as an Environmental Engineer assigned to the Environmental Division, Public Works Department. The Environmental Engineer was required to serve as the Environmental and Natural Resources Program Manager to ensure Cutler's compliance with all Navy, Environmental Protection Agency (EPA), and Maine Department of Environmental Protection (DEP) laws and regulations. AF, Tab 11, Subtab 1.

With respect to construction contracts, the Environmental Engineer was responsible for preparing documentation of compliance with the National Environmental Policy Act (NEPA). Where a construction contract was to be awarded by Northern Division, Naval Facilities Engineering Command ("NAVFAC" or "Northern Division"), the Environmental Engineer was responsible for

passing the proposed contract on to NAVFAC for review by the Environmental Planning Team AF, Tab 11, Subtab 4, June 2, 1999 e-mail from Robert Ostermueller to appellant. The Environmental Engineer also acted as advisor to the Command during oil and hazardous substance management and releases in the areas of initial response, containment and cleanup. In addition, the Environmental Engineer functioned as the Navy On-Scene Commander (NOSCDR) in the event of a Navy caused oil or hazardous material spill. As the NOSCDR, the Environmental Engineer ensured that clean up efforts were sufficient to meet regulator requirements, prevent risk to health and safety of the public, prevent further environmental contamination and restore the environmental quality of the affected area. AF, Tab 11, Subtab 1.

Until February 1995, the appellant's position of Environmental Engineer was located in the Office of the Commanding Officer. The Commanding Officer at that time was Captain Glidden.fn2 From February 1, 1998 onward, the position was relocated to the Public Works Department. The appellant's immediate civilian supervisor became Robert Leclerc, Assistant Public Works Officer. Beginning in September 1995, LCDR Roger Wakeman was assigned as Public Works Officer and Commander John Mikell was assigned as Commanding Officer.

The current dispute stems from the appellant's role in the coordinated review of a project to paint Cutler's VLF (Very Low Frequency) Towers and the Helix Houses. These facilities are located on an environmentally sensitive peninsula in East Machias,

Maine overlooking intertidal clam flats and fishing grounds. The structures are configured in north and south antenna arrays. The towers supporting the arrays range in height from 799 to 875 feet and were scheduled for painting and new lighting primarily to promote aviation safety.

The first phase of the project involved paint removal at the South Helix House. This phase was completed in the summer of 1996. The next phase involving the VLF Towers and the Northern Helix House was scheduled to begin in the summer of 1997.

The 1996 NEPA Checklist

On September 26, 1995, a construction meeting took place which was coordinated by Oak Point Associates, a consultant assigned to the VLF Tower project. The main environmental issues discussed by the participants fn3 concerned lead abatement and containment related to the removal of old paint, and the need not to disturb Osprey nests until after the young birds had left in late August or early September. AF, Tab 1, Attachment 4, pp. 73-74 of the appellant's submission to OSC entitled "Reasons Why Whistleblower Actions Were Contributing Factor to Letter of Reprimand" (hereinafter CSC submission).

On March 1, 1996, the appellant, acting in his capacity as Environmental Engineer, submitted a detailed and critical review of Oak Point's design analysis for painting and repairing the North and South VLF Towers to Captain Glidden. In his first substantive comment, the appellant noted the

consultant's conclusion that "if containment is used, an [E]nvironmental [A]ssessment [EA] will not be needed." The appellant recommended that the contractor be required to prepare a checklist to document compliance with NEPA. The appellant further noted that as "standard practice, we perform a NEPA determination for any project which is signed by the Commanding Officer as proof of NEPA compliance." Id., p. 70.

The appellant subsequently prepared by hand a NEPA "checklist" dated March 22, 1996. On the first page of this checklist, under the section requiring a "description of the environmental setting and present land use of the proposed site," the appellant wrote:

> Sensitive environment characterized by proximity to coastline and to commercial shell harvesting areas. Please note that Oak Point has stated that project would be completed under 100% containment and that an environmental assessment would not be required. This checklist prepared under assumption of 100% containment.

AF, Tab 11, Subtab 3. On the last page of the checklist, under the section requiring a "discussion of environmental analysis of potential impacts to include proposed mitigation procedures," the appellant wrote: "Addressed in report prepared by Oak Point Associates (19 Jan 96). My comments were presented in memo dated of Mar 96." The last section to be completed on the checklist required that the appellant make a determination as Environmental Officer whether, inter

alia, a Categorical Exclusion memorandum based on cited provisions of the applicable Naval Instruction should be prepared. The appellant indicated that such a memorandum should be completed and he signed the checklist.

Attached to the checklist was a copy of the required "Categorical Exclusion" form. The form was partially completed by the appellant. He described the covered action as "Paint VLF Towers." The specific type of categorical exclusion was noted. The form contained a signature block for the Commanding Officer's signature and date. Next to this line were two arrows signifying that a signature and date was needed. However, the Commanding Officer's signature is not on the document. Below this block were signature and date lines for "Concurrence" by the "Installation Environmental Officer/POC." The appellant had signed and dated the concurrence. Id.

Discovery of PCB's Around South Helix House

Paint removal continued at the South Helix house throughout 1996. As recounted by the appellant,fn4 soil samples taken in October and November 1996 revealed the presence of PCB's. Three samples that were taken from South Helix House within a 20-foot radius and indicated the presence of PCB with levels ranging from 1100 to 4500 parts per million (ppm). The appellant further reported that "the contamination might be due to a spill which occurred in the mid 1980's or as result of a paint removal operation (water blasting) during 1996." The appellant explained that at a contamination level of 1600 ppm, one fifty-five gallon drum of contaminated soil would represent a quantity of PCB above the

reportable quantity (RQ) of one pound. AF, Attachment 4, OSC Submission, p. 64. On December 3, 1996, the appellant sent a summary of DEP notification requirements to Captain Glidden "that outlined the need to either take additional samples to quantify [the] extent of contamination or to make immediate notification to Maine DEP." Id., pp. 7-8. There is no dispute that additional samples were not taken and notification was not made to DEP.

The March 1997 Discovery of PCB's around the VLF Towers, the Appellant's November 1997 Report to NAVFAC and the December 1997 Reporting of PCB's

In March 1997, the paint to be removed in the VLF Tower project was tested and determined to contain PCB's. The painting contract was subsequently modified to include protective measures for PCB control and management. The next phase of the project subsequently began in the Spring of 1997 and continued through the Summer.

Following a visit to Cutler by NAVFAC, the appellant performed a review of the project to date in November 1997, which he submitted to NAVFAC for review. As part of his report, the appellant offered the following recommendations:

> Due to the inability to attain full containment, an environmental assessment study is advisable in order to outline potential impacts associated with the creation of more mobile contaminants. Available data could be used to assess

operational limitations and to perform additional field measurements.

The assessment would allow regulatory review of anticipated impacts and provided a reference for additional paint removal operations. The study would concentrate on environmental concerns associated with impacts on endangered species/ plants, air quality, water quality and land resources. The assessment would also analyze the impacts of "no-action"; i.e., allowing paint chips to fall and accumulate with time. As a side note, during the preparation of NEPA documentation for this project, I contacted the Maine DEP to determine if a permit under the Natural Resources Protection Act (NRPA) was required based on project specifications. At that time, a permit was not required under the assumption that the project would provide 100% containment. The need for NRPA permitting whit allows for public comment would be revisited during a formal assessment process. An environmental impact assessment would also result in the analysis of soil samples at various locations on and around the VLF peninsula.

AF, Tab 1, Attachment 2, p. 65.

In December 1997, NAVCOMTESTA Cutler notified Maine DEP on the presence of PCB's in the soils around the VLF towers water blasted in 1997 and around the South Helix House. Maine DEP in

response to this notification requested clean-up action and the immediate termination of discharges from the structures. The EPA indicated that NAVCOMTELSTA Cutler required an Alternate Method of Disposal Approval (AMDA) permit and that paint removal operations could not be initiated until the facility was in compliance with the Toxic Substances Control Act (TSCA) standards. AF, Tab 12, Subtab 3.

On January 16, 1995, Northern Division issued its own report apparently in response to the appellant's review. As reflected in a January 28, 1995 critique of this report prepared by the appellant, Northern Division did not directly respond to the appellant's suggestion that an EA be performed. AF, Tab 1, Attachment 2, pp. 60-62.

In September 199S, the Maine DEP and EPA in cooperation with the NAVCOMTESTA Cutler, NAVFAC and the contractor, Abne Svoboda, began to develop a work plan that addressed TSCA and State of Maine regulations. Id; Hearing Tapes 6 and 7.

The NEPA Documentation Controversy

In April 1999, the appellant prepared a new NEPA documentation checklist based on the new specifications that were developed to apply to the final 14 VLF towers. This new checklist included a recommendation that an EA be performed. AF, Tab 12, Subtab 3. By e-mail dated April 16, 1999, LCDR Wakeman asked the appellant whether he had contacted NAVFAC regarding requirement for

additional NEPA documentation "since this was not a new project requirement, but only phase two of an existing project?" LCDR Wakeman further explained that

> [u]nder normal special project documentation the NEPA compliance documentation should have been prepared for the original project, and it is worth checking to see if additional documentation is required, assuming it was done originally. You may have already done this but I would like to confirm.

AF, Tab 5, Subtab E.

In an April 19, 1999 response to this e-mail, the appellant informed LCDR Wakeman that

> during a review of the initial project in 1996 or 1997, a decision was made that an Environmental Assessment was not required since specifications required full containment. We all know that full containment is not a realistic objective and Abne & Svoboda has submitted a work plan for paint removal that reflects far less than full containment. In 1996 and 1997, I supported the decision at the facility level to recommend against an EA under the assumption that the contractor would perform the work under full containment conditions. I will check with Northern Division to see if they have performed an independent NEPA assessment. In my

> opinion, the Commanding Officer has to maintain some documentation on NEPA assessment. As I mentioned in my remarks, I believe that the requirement for submittal of a work plan to regulatory agencies will protect the U.S. Navy against any charges that it did not follow NEPA guidelines. I agree that this is not a new project; however, the specifications should be different to indicate that full containment is no longer a requisite for the project and that past history indicates an added level of environmental oversight by regulatory agencies.

Id. Approximately a month later, on May 18, 1999, the appellant reported in an e-mail to Commander Mikell and LCDR Wakeman that he had "requested guidance from [NAVFAC] on this issue." He reported that he contacted Mr. Paul Burgio who in turn passed on his request to Robert Ostermueller of the NAVFAC Environmental Planning team. He related a conversation with Mr. Ostermueller who told him that a "categorical exclusion" was not appropriate for the project, but that Mr. Ostermueller would review the project information before making a definite conclusions.fn5 AF, Tab 1, Attachment 4, OSC submission, pp. 28-29.

Mr. Ostermueller subsequently e-mailed the appellant on May 26, 1999 as follows:

Norman;

I have looked at the info you sent me concerning the painting of the VLF towers - frankly I do not agree with the statement by the consultant (oak point) that if containment is (was) used, that an environmental assessment would not be required.

There was no cat ex available then and none exists now (new cat ex's are out) that would allow this project to comply with our OPNAVINST 5090. As a minimum, an EA should have been prepared.

An EA (or EIS) is prepared for two purposes: one, to assess the possible environmental effects of the Navy's PROPOSED action(s) AND two, to inform the public.

A work plan for a specific action can be incorporated into an EA but it does not eliminate the need to prepare an EA.

As your info indicates, the containment that was to eliminate the need for an EA didn't work and there has (sic) been PCB's released into the environment (albeit small quantities). Even if the containment did work, this action does not (did not) fall under any cat ex that I am aware of.

> I am not sure what you are asking of me now - this project has commenced without being in compliance with OPNAVINST 5090. I do not know what is happening now -is there more work planned?
>
> I will be in my office Thursday 27 May. Pls call me to discuss further.

AF, Tab 1, Attachment 2, OSC Submission, p. 45.

On May 27, 1999, the appellant responded to Mr. Ostermueller by e-mail, agreeing with his conclusion that an EA or EIS was needed regardless of any agreement with the regulatory agencies to have them approve a work plan. The appellant agreed with Mr. Ostermueller's conclusion that a Categorical Exclusion was not appropriate for the project and acknowledged that "the fact that an EA or EIS has never been completed also violates Navy policy under NEPA." Id., pp. 47-48.

On that same date, the appellant e-mailed Commander Mikell. The appellant stated in pertinent part:

> I have provided this summary in order to outline the procedures that I used to receive opinions from Northern Division. Mr. Ostermueller has been extremely responsive on this issue. In briefing you on the NEPA issue yesterday, Mr. Leclerc might have overlooked some of the details of my involvement in this process. Please

> note that I have made a determined effort in receiving comments from Northern Division; however, I also believe that I have been supported in my conclusions. I believe that my review has been documented and has been consistent since October 1996 when PCBs were first detected from paint chips from the South Helix House. It seems that Mr. Ostermueller has been unable to obtain copies of any NEPA documents completed at Northern Division on this topic. Please note that Mr. Ostermueller agrees with my conclusion that an EA (or EIS) was and is necessary for the project...

Id., pp. 46-47.

On June 1, 1999, the appellant again e-mailed Mr. Ostermueller. The subject of the e-mail was "NEPA verification." In this e-mail, the appellant explained that

> certain individuals at NAVCOMTELSTA Cutler would like to have our CO or your CO make a decision that would allow the present contractor, Abne & Svoboda, continue the work this year without the benefit of an EA or EIS. I have seen a number of errors made on this project both in the filed and in the office and I don't know who will make the final decision on this issue. I certainly support your position. Some of the questions that will be raised included the following

i. Did Northern Division complete NEPA documentation for the 1996 and 1997 projects?

Id., p. 50.

Mr. Ostermueller replied to the appellant by e-mail on June 3, 1999. In answer to the question, "Did Northern Division complete NEPA documentation for the 1996 and 1997 projects?" Mr. Ostermueller wrote:

> As far as I know, nothing (no EA/EIS) was prepared by NORTHDIV for this action. As head of the Environmental Planning Team with NEPA responsibility, I can say I was not even aware of this project until you called. NEPA responsibility rests with the action Proponent - in this case your activity. NORTHDIV does not take on this responsibility unless we are requested to assist the activity where the action is planned. If this construction contract was awarded via our Contracts Division, there SHOULD have been a review to determine if NEPA was satisfied but it was never passed to my team for review. (Emphasis in original)

Id., p.54.

On June 7, 1999, the appellant sent to Commander Mikell a memorandum captioned "NEPA Discussion on VLF Painting Contract." The appellant concluded this memorandum as follows:

> I did not prepare NEPA documentation for the project in 1996 since Oak Point associates had taken this responsibility. It now seems that NAVFAC did not request a NEPA analysis. In 1996, I assumed that the project would be performed in full containment and I did not know that the paint contained PCBs.

Id., p. 58-59.

On June 8, 1999, the appellant e-mailed LCDR Wakeman that he had found a copy of the 1996 NEPA documentation. The appellant wrote in pertinent part:

> I found a copy of the NEPA documentation for the VLF tower project at home last night; however, I forgot to bring it in today. The checklist is dated 22 March 1996 and, in the document, I revert to Oak Points Associates' decision that an environmental assessment was not needed if containment was used for the project. Maybe Eileen can find the CO's copy since 22 March 1996 was probably the date that I sent the document over for the CO's action. However, I doubt that any action vas taken on this document just like all the other NEPA checklists sent to the command.

Id., p. 77.

Jurisdictional Requirements

To establish Board jurisdiction over an IRA appeal, an Appellant must show by preponderant evidence that: He engaged in whistleblower activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8); the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2); and he raised the issue before the OSC, and proceedings before the OSC were exhausted. A disclosure protected by 5 U.S.C. § 2302(b)(8) is "any disclosure of information by an employee ... which the employee ... reasonably believes evidences a violation of law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety...." To be entitled to protection, disclosures must be specific and detailed, not vague allegations of wrongdoing regarding broad imprecise matters. Kraushaar v. Department of Agriculture, 87 M.S.P.R. 378, 381 (2000) (citations omitted).

The Appellant's Claim for Whistleblower Protection

As set forth in his closing submissions,fn6 the appellant maintained that he received a June 17, 1999 letter of reprimand in retaliation for making three disclosures protected under 5 U.S.C. § 2302(b)(8) relating to the management of these contracts. The appellant alleged that these disclosures were: (1) the Command violated Maine Department of Environmental Protection (DEP) regulations in December 1996 by failing to notify DEP following the discovery of PCB's in the soil surrounding the South Helix House; (2) the Command violated the

National Environmental Policy Act (NEPA) by allowing water-blasting paintremoval activities to continue in May 1997 when the contractor was unable to perform the operation with full containment and thus satisfy the assumptions of the appellant's assessment of NEPA requirements in March 1996; and, (3) personnel from NAVFAC violated NEPA by not responding correctly to the appellant's suggestion in November 1997 to conduct an EA. The appellant further alleged that these disclosures were made in a series of e-mails to Commander Mikell, with copies to LCDR Wakeman and Mr. Leclerc.

In its closing argument, the agency maintained, inter alia, that the appellant failed to meeting his jurisdictional burden of proving that he made a protected disclosure. The agency argued that the appellant's alleged disclosures at best amounted to expressions of opinion based on debatable interpretations of unspecified environmental laws, rules and regulations.

The Appellant's Alleged Disclosures

The first e-mail cited by the appellant was sent on March 22, 1999 accompanied by a "chronology" As part of this chronology, the appellant wrote:

> 03 December 1996-- I sent a summary of DEP notification requirements to Captain Glidden that outlined the need to either take additional samples to quantify the extent of contamination or to make immediate notification to Maine DEP.

> Additional samples were not taken and notification was not made to Maine DEP. In hindsight, notification in December 1996 would have increased regulatory scrutiny for paint removal projects undertaken during 1997. EPA involvement would have undoubtedly raised the issue for the need for an [Alternate Method of Disposal Approval] permit and the need to adhere to strict limits for the release of PCB contaminated water.

See AF, Tab 1, Attachment 2, OSC Submission, pp. 6-11.

The next e-mail was sent to the same addressees on May 28, 1999. The subject of the e-mail was "NEPA verification." The appellant provided a chronological summary of his contacts with Mr. Ostermueller in April and May 1999 relating to the application of NEPA. At the conclusion of this e-mail, the appellant wrote in pertinent part: "Mistakes were made in the past; however, to now disregard a known regulation or protocol would cause a different, and possibly more serious type of problem." Id., pp. 31-32.

On June 3, 1999, the appellant forwarded another e-mail. He wrote in pertinent part:

> I have noted a number of occasions that measures should have been taken as early as May 1997 to question the appropriateness of the paint removal operation when full containment was not

> achievable by the contractor. I have also expressed concerns with the lack of timeliness on the PCB issue as early as October or November 1996. It seems that the completion of the project might have had the priority over environmental and possible, safety compliance issues since the project was first conceived by the proponent. I believe that I have been consistent in my assessment of the paint removal project. The distinct possibility that someone will raise the EA/EIS issue with the Abne & Svoboda work should be considered in any deliberations. I also believe that Northern Division has some serious questions to answer both in terms of The development of project plans and with regards to contract oversight responsibilities. The designer for the project, Oak Points Associates, also deserves some attention due to the unrealistic expectations reflected in their specifications.

AF, Tab l, Attachment 3.

The last document cited by the appellant was his June 7, 1999 memorandum to Commander Mikell. The appellant cited the following passage as his disclosure:

> ... I have stated my problems with the VLF project on a number of occasions. I summarized these concerns in a document titled, Chronology: Paint Removal and

> Painting of VLF Structures, that I sent you within the past two months. In this document that was prepared on my own time, I summarized the lack of appropriate response to the detection of PCBs in the waste from South Helix House in October 1996 and to the fact that the contractor was unable to provide full containment during May 1997. If the command had provided notification to Maine DEP in November or December 1996 on the detection of PCBs around the South Helix House, the project would have received a greater level of environmental oversight by regulators. This notification might have led to a revision of paint removal plans before the initiation of work in May 1997.

AF, Tab 1, Attachment 2, OSC submission, pp. 58-59.

The appellant failed to prove that he made a protected disclosure.

To show that he made a disclosure protected under 5 U.S.C. § 2302(b)(8), the appellant must show that the matter reported was one that a reasonable person in his position would believe evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health and safety. He need not prove that the condition disclosed actually established any of the situations detailed under 5 U.S.C. 2302(b)(8); rather, he must only show that the matter disclosed

was one which a reasonable person in his position would believe evidenced any of these situations. The test for determining whether an employee's belief with respect to such a matter is reasonable is this: could a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee reasonably conclude that the actions of the government evidence the wrongdoing in question. Johnson v. Department of Defense, MSPB Docket No. DE-1221-00-12205-W-1, slip op. at 2 (Dec. 28, 2000).

None of the appellant's three alleged disclosures meets this test. With respect to the first alleged disclosure, the appellant recounted that he concurred with the opinion of Northern Division Personnel that the presence of PCB's in the soil "should" be reported to Maine DEP. He did not assert that the Command was required to report this discovery.

In the March 22, 1999 chronology, the appellant stated that he had sent to Captain Glidden "a summary of DEP notification requirements that outlined the need to either take additional samples to quantify the extent of contamination or to make immediate notification to DEP." The appellant also stated that "additional samples were not taken and notification was not made to Maine DEP."

In the appellant's November 1997 report to NAVFAC, he explained that three samples taken from a 20-foot radius indicated the presence of PCB's with levels ranging from 1100 to 4500 parts per million adjacent to South Helix House. He

further explained that at contamination levels of 1600 ppm, one 55 gallon drum of contaminated soil would represent a quantity of PCB above the reportable quantity (RQ), i.e. one pound.

Thus, the facts available to the appellant indicated that the samples taken in December 1996 were inconclusive, ranging both lower and higher than the 1600 ppm standard, The available facts further indicated that the Command did not have enough information in December 1996 to determine whether the PCB's present at South Helix House were a reportable quantity. Accordingly, I find that a disinterested observer could not reasonably conclude with the knowledge available to the appellant at the time of his alleged disclosure that the Command violated any law or regulation by failing to notify DEP in December 1996 that the South Helix House paint removal project had resulted in a reportable quantity of PCB's.

As to the second alleged disclosure, the appellant made no showing that a disinterested observer could conclude that continuation of the water-blasting operations without full containment violated NEPA. As noted by Mr. Ostermueller in his May 26, 1999 e-mail to the appellant, no Categorical Exclusion existed that permitted the paint project to begin without at least performing an EA. In response to this e-mail, the appellant agreed that a Categorical Exclusion was not appropriate for this project and further agreed "that the fact that an EA or EIS has never been completed also violates Navy policy under NEPA." Thus, the evidence indicates that appellant was

aware that NEPA was violated not in 1997, but in 1996, when the project first went forward without either an EA or an EIS. I therefore find that with the knowledge available to the appellant at the time of his alleged disclosure, a disinterested observer could not reasonably conclude that Command violated by NEPA by continuing water-blasting activities. Whether the project continued or not, the agency was already in violation of NEPA because neither an EA nor an EIS had been performed.

There is also no basis to conclude that NAVFAC personnel violated NEPA by not "responding correctly" to the appellant's suggestion in November 1997 to conduct an EA. Whatever the value of NAVFAC's January 16, 1995 report, there is no dispute that paint was not removed in 1998. Moreover, Mr. Ostermueller, the head of NAVFAC's environmental planning team, identified the NEPA violation occurring in 1996 and recommended that this violation be cured by completing an EA before paint removal activities resumed. I thus find that with the knowledge available to the appellant at the time of this disclosure, a disinterested observer could not reasonably conclude that NAVFAC's response to the appellant's November 1997 memorandum violated NEPA.

Finally, in his response to the agency's written closing statement, the appellant characterized his claimed disclosures not only as a alleged violations of environmental laws and regulations but as a "gross waste of funds." Disclosure of waste of funds

is protected under § 2302(b)(8). A "gross waste of funds" constitutes a more than debatable expenditure that is significantly out of proportion to the benefit reasonably expected to accrue to the government. Gaugh v. Social Sec. Administration, 37 M.S.P.R. 245, 248 (2000); Van Ee v. Environmental Protection Agency, 64 M.S.P.R. 693, 698 (1994).

The appellant has made no showing that a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the appellant could reasonably conclude that either the lack of notification to DEP in December 1996, the continuation of water-blasting activities in May 1997 or the alleged delay by personnel from NAVFAC resulted in any expenditure of funds -let alone an expenditure that was more than debatable and significantly out of proportion to the benefit reasonably expected to accrue to the government.

In light all of the foregoing, I find that the appellant has failed to prove that he made a protected disclosure under 5 U.S.C. § 2302(b)(8). Accordingly, the appellant's request for corrective action must be dismissed for lack of jurisdiction.

DECISION

The appellant's request for corrective action is DISMISSED.

FOR THE BOARD:
John F. Markuns Administrative Judge

NOTICE TO PARTIES CONCERNING SETTLEMENT

The date that this initial decision becomes final, which is set forth below, is the last day that the administrative judge may vacate the initial decision in order to accept a settlement agreement into the record. See 5 C.F.R. § 1201.1 12(a)(5).

NOTICE TO APPELLANT

This initial decision will become final on March 30, 2001, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your

petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1615 M Street, NW.
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your

petition must be received by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervener may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail, unless otherwise indicated below, this day to each of the following:

Appellant
Normand Laberge
RR 1, BOX 3190
Trescott, ME 04652

Agency's Representative(s)
Robert S. Knowles
U.S. Department of The Navy
Human Resources Office
Box 20, Building 138
Croton, CT 06349-5020

Other
Kenneth L. Bates
U.S. Office of Personnel Management
Employee Relations Division
1900 "E" Street, N.W., Room 7412
Washington, DC 20415

(Date)
February 23, 2001

JOYCE REYNOLDS
PARALEGAL SPECIALIST

Footnotes

fn1 In this same submission, the appellant also requested corrective action to remedy several other alleged retaliatory actions for whistleblowing activities. This request was docketed as a separate appeal. The appellant's request was subsequently dismissed for lack of jurisdiction See Laberge v. Department of the Navy, MSPB Docket No B. N.1221-00-123-W-1 (Initial Dec., Aug. 4, 2000).

fn2 Captain Glidden's full name is not evident in the record.

fn3 The participants included the appellant and other agency personnel.

fn4 See AF, Tab 1, Attachment 4, OSC Submission, pp. 6-7.

fn5 One of the instances of alleged misconduct cited in the letter of reprimand concerned an alleged emotional outburst by the appellant during a conversation on May 24, 1999 between the appellant and Mr. Leclerc concerning the status of the NEPA documentation. AF, Tab F.

fn6 On October 23, 2000, after the record closed, the appellant filed a response to the agency's closing

statement "to outline specific corrections to the record as the result of [the agency's] most recent comments." Insofar as the appellant's pro se response was limited to addressing new agency arguments, I find good cause to waive 5 C.F.R. § 1201 55 pertaining to the close of record and hereby accept the appellant's response to the agency's closing argument. See Taylor v. Department of Health and Human Services, 32 M.S.P.R. 342, 344 (1987) (Administrative judges have broad authority to waive regulation pertaining to close of record).

Supreme Court, U.S.
FILED
FEB 20 2004
OFFICE OF THE CLERK

(2) (2)

Nos. 03-738 and 03-739

In the Supreme Court of the United States

ALBERT E. BIVINGS, PETITIONER

v.

DEPARTMENT OF THE ARMY

NORMAND LABERGE, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether reports made by federal employees through normal channels as part of their assigned normal job duties are protected disclosures under the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A).

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In the Supreme Court of the United States

No. 03-738

ALBERT E. BIVINGS, PETITIONER

v.

DEPARTMENT OF THE ARMY

No. 03-739

NORMAND LABERGE, PETITIONER

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DEPARTMENT OF THE NAVY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The judgment of the court of appeals in No. 03-738 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 65 Fed. Appx. 731. The final order of the Merit Systems Protection Board (03-738 Pet. App. 2a-4a), affirming the initial decision of an administrative judge (03-738 Pet. App. 5a-21a), is reported at 92 M.S.P.R. 225 (Table).

The judgment of the court of appeals in No. 03-739 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 66 Fed. Appx. 204. The opinion of

the Merit Systems Protection Board (03-739 Pet. App. 3a-30a) is reported at 91 M.S.P.R. 585.

JURISDICTION

The judgments of the court of appeals were entered on June 6, 2003. The petitions for rehearing were denied on August 22, 2003 (03-738 Pet. App. 22a; 03-739 Pet. App. 2a). The petitions for a writ of certiorari were filed on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are federal employees who seek to challenge the judgments of the court of appeals that affirmed without opinion final orders of the Merit Systems Protection Board (MSPB or the Board). The Board denied petitioners' individual right of action (IRA) appeals filed pursuant to the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-112, § 4, 103 Stat. 32 (5 U.S.C. 2302). The WPA gives the Board jurisdiction to adjudicate claims of reprisals by federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A).

1. a. The petitioner in No. 03-738, Albert E. Bivings, is a Wildlife Biologist for the Department of the Army Forces Command (FORSCOM) Headquarters, Fort McPherson, GA. 03-738 Pet. App. 9a. Petitioner is responsible for assisting FORSCOM installations in achieving compliance with various wildlife management statutes. *Ibid.* Petitioner's responsibilities include identifying areas where compliance could be improved. *Id.* at 17a.

Petitioner filed an IRA appeal with the MSPB claiming that various personnel actions were taken against

him in retaliation for his having made allegedly protected disclosures under the WPA. 03-738 Pet. App. 5a-6a. Specifically, petitioner claims that he brought to the Army's attention alleged violations of the Sikes Act, 16 U.S.C. 670a *et seq.*, as it pertains to the privatization of natural resource management positions, and of a 1992 Jeopardy Biological Opinion relating to a forest burning plan designed to promote the growth of long leaf pines at Fort Stewart, North Carolina. 03-738 Pet. App. 9a.

Following a hearing, an administrative judge dismissed petitioner's appeal, finding that none of the alleged disclosures was protected under the WPA. 03-738 Pet. App. 5a-21a. With respect to the Sikes Act reports, the judge found that petitioner had expressed "differences of opinions and disagreement regarding policy" that "do not constitute whistleblowing," *id.* at 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. The judge made similar findings with respect to petitioner's alleged Fort Stewart disclosures. *Id.* at 16a-18a.

The judge additionally found that "it is part of [petitioner's] job responsibilities to identify areas where compliance could be improved and to assist installations in making improvements." 03-738 Pet. App. 17a. The judge observed (*ibid.*) that petitioner's reports therefore were not protected disclosures under the Federal Circuit's decision in *Huffman* v. *Office of Personnel Management*, 263 F.3d 1341, 1351-1355 (2001), which held that the WPA does not cover reports by employees that are made through normal channels as part of the employee's normal assigned duties.

b. The MSPB summarily denied the petition for review of the initial decision. 03-738 Pet. App. 2a-4a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's decision. 03-738 Pet. App. 1a.

2. a. The petitioner in No. 03-739, Normand Laberge, is an Environmental Engineer at the Naval Computer and Telecommunications Station Cutler, East Machias, Maine (Cutler). 03-739 Pet. App. 4a. He serves as an Environmental and Natural Resources Program Manager who is responsible for ensuring Cutler's compliance with all applicable federal and state environmental laws and regulations. His major duties include providing "authoritative guidance" to the NCTS Cutler commanding officer and others on "the interpretation of environmental laws, regulations, standards, policies and directive concerning same." *Id.* at 4a, 6a-7a. Petitioner is also responsible for documenting compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 03-739 Pet. App. 14a.

On June 17, 1999, the Navy issued a letter of reprimand to petitioner. 03-739 Pet. App. 5a. Petitioner subsequently filed an IRA appeal with the MSPB pursuant to 5 U.S.C. 1221, arguing that the Navy's action was taken in retaliation for his role in the review of a project to paint certain towers and other structures that are located on environmentally sensitive federal lands. He claimed that he had made the following allegedly protected disclosures under the WPA: (1) informing the Command that it should have notified the Maine Department of Environmental Protection that PCBs had been discovered in the soil surrounding the project site after paint had been stripped from the towers; (2) informing the Command that it should conduct environmental assessments on the project's

effects after it was determined that the PCBs could not be fully contained; and (3) suggesting that Navy should conduct an environmental assessment on the project. 03-739 Pet. App. 6a.

Following a hearing, an MSPB administrative judge issued an initial decision dismissing petitioner's appeal for lack of jurisdiction because petitioner had failed to show that he had a reasonable belief that his disclosures evidenced the wrongdoing described in the WPA, 5 U.S.C. 2302(b)(8). 03-739 Pet. App. 31a-60a.

b. Petitioner filed a petition for review with the full MSPB and on June 14, 2002, the MSPB denied the petition but reopened the case upon its own motion pursuant to 5 C.F.R. 1201.118. The Board affirmed the initial decision, as modified, and dismissed the appeal for lack of jurisdiction under *Huffman*, *supra*, which was decided after the administrative judge had issued his initial decision. 03-739 Pet. App. 3a-9a. The Board concluded that, although petitioner may have reasonably believed that he was disclosing the Navy's violations of environmental laws or regulations in implementing the tower project, the petitioner merely was performing his normal duties as an Environmental Engineer. *Ibid.*

In a separate concurring opinion (03-739 Pet. App. 9a-30a), Board member Slavet stated that she "agree[d] that the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties," *id.* at 9a, but that she disagreed with the court of appeals' decision in *Huffman*, *id.* at 12a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's final decision. 03-739 Pet. App. 1a.

ARGUMENT

1. Petitioners contend that the Federal Circuit in *Huffman*, *supra*, was incorrect in holding that the WPA does not protect reports of wrongdoing by federal employees acting through normal channels as part of their normal job duties. 03-738 Pet. 8-13; 03-739 Pet. 8-13. That contention lacks merit.

The WPA provides protection to federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A). As the court of appeals in *Huffman* explained, the statutory term "disclosure" does not address the precise issue whether an employee makes a protected report when he is explicitly assigned the job responsibility of reporting government wrongdoing and he reports such wrongdoing through normal channels. 263 F.3d at 1350, 1352. The court thus properly interpreted the term in light of the remedial scheme for federal workers with normal employment claims and Congress's "central purpose" in the WPA "to protect employees who go above and beyond the call of duty and report infractions of law that are hidden." *Id.* at 1352, 1353.[1]

The Act's central purpose is not served where an "employee has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels." 263 F.3d at

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[1] The *Huffman* court found further support for its conclusion in the related provisions of 5 U.S.C. 1221(e)(1), which govern how an employee can demonstrate that a disclosure was a contributing factor in a personnel action. Those factors appear to presuppose that a report to a distinct supervisor through normal channels is not a "disclosure." See 263 F.3d at 1352 n.4.

1352. For example, "the core purposes of the WPA are simply not implicated by" the reporting of wrongdoing by "[a] law enforcement officer whose duties include the investigation of crime by government employees" or the reporting of wrongdoing by "[e]mployees of an inspector general's office." *Ibid.*

Moreover, the court of appeals in *Huffman* made clear that the WPA *does* protect many disclosures by employees who are responsible for reporting government wrongdoing. The court thus concluded that a protected disclosure includes "the situation in which an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels," as well as "the situation in which the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties." 263 F.3d at 1354.

Petitioners also are mistaken in faulting the court of appeals in *Huffman* for not giving sufficient weight to the legislative history of the 1994 amendments to the WPA that expresses displeasure with decisions by MSPB administrative judges that had concluded that the Act did not protect disclosure made through normal channels as part of assigned job duties. See S. Rep. No. 358, 103d Cong., 2d Sess. 11 (1994). As the court in *Huffman* explained, "in 1994 the [WPA's] disclosure provisions were not amended," and accordingly "post-en-actment statements made in the legislative history of the 1994 amendment have no bearing on [the court's] determination of the legislative intent of the drafters of the 1978 and 1989 legislation." 263 F.3d at 1354. To the contrary, "it could be viewed as significant that Congress in 1994," aware of prior MSPB decisions, "did not amend the language of section 2302 to address this

issue, thus leaving the matter for judicial resolution under the existing language of the Act." *Ibid.*[2]

2. Petitioners also contend that *Huffman* conflicts with this Court's decision in *Waters* v. *Churchill*, 511 U.S. 661 (1994). 03-738 Pet. 13-17; 03-739 Pet. 13-17. That contention also lacks merit. *Waters* concerned First Amendment protections for speech by governmental employees, and petitioners here have never asserted a First Amendment claim. Moreover, *Waters* does not purport to interpret the WPA, much less purport to address whether reports of government wrongdoing through normal channels as part of the employee's assigned duties is a protected disclosure under the WPA. Rather, *Waters* simply cites the Act for the propositions that arguably "high officials should allow more public dissent by their subordinates," 511 U.S. at 673, and that "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment," *id.* at 674. Neither of those statements addresses petitioners' interpretation of the WPA.

3. Finally, petitioners claim that they did not report the alleged wrongdoing through normal channels or as

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[2] Petitioners also contend that *Huffman* conflicts with earlier decisions of the Federal Circuit. 03-738 Pet. 6-8; 03-739 Pet. 7-9. That claim lacks merit. Although previous Federal Circuit decisions contained some "conflicting statements in dictum," the Federal Circuit previously in *Willis* v. *Department of Agriculture*, 141 F.3d 1139, 1143 (1998), "specifically held that an employee who makes disclosures as part of his normal duties cannot claim the protection of the WPA." *Huffman*, 263 F.3d at 1352. In any event, any intracircuit conflict would be for the Federal Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

part of their normal assigned job responsibilities. 03-738 Pet. 17-22; 03-739 Pet. 17-22. The court of appeals did not address those fact-bound contentions in its unpublished decisions, and this Court should accordingly decline to address them in the first instance.

In any event, petitioners' contentions are incorrect. As to petitioner Laberge, the MSPB carefully reviewed the record and petitioner's job descriptions, and the Board found that his "actions were within the duties described in his position description," 03-739 Pet. App. 6a, and similarly that he "was investigating and reporting wrongdoing as part of his normal duties through normal channels," *id.* at 7a. That holding was also joined by Board member Slavet in her concurring opinion, which concluded that "the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties." *Id.* at 9a; accord *id.* at 12a, 23a.

Review is similarly not warranted with respect to petitioner Bivings. The MSPB summarily rejected the petition for review of the administrative judge's decision. 03-738 Pet. App. 2a-3a. And the administrative judge specifically found that petitioner's alleged disclosures were unprotected for various reasons in addition to the fact that they were made in connection with petitioner's normal job duties.[3] Therefore, even were the Court to accept petitioner's interpretation of the

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[3] The judge found that petitioner expressed "differences of opinion and disagreement regarding policy" that "do not constitute whistleblowing," 03-738 Pet. App. 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. Accord *id.* at 16a-18a.

WPA, the court of appeals still correctly affirmed the Board's dismissal of petitioner's appeal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 2004